



Testimony Before the Senate Committee on Environment and Public Works, June 27, 1995

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TESTIMONY BEFORE THE SENATE
COMMITTEE ON ENVIRONMENT
AND PUBLIC WORKS, JUNE 27, 1995

*FRANK I. MICHELMAN**

I. INTRODUCTION

I am here to testify about the bearing of the Constitution, and particularly the Fifth Amendment's requirement of just compensation for takings of private property for public use, on proposed "property rights" legislation. Such legislation would require payments of money to property owners to offset market-value reductions attributable to certain kinds of federal regulatory restrictions on use,¹ regardless of whether a court acting on the basis of the Amendment would require any such payment.

The bottom line of my testimony is that the case for legislation of this kind rests on a mistakenly oversimplified, a mistakenly purist, view of the place of private property rights, basic and important as those certainly are, in our full constitutional scheme. The legislation's premise is that the freedom of owners to do with their property whatever they

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1. Under the pending Senate bill, some state-imposed restrictions might also be affected insofar as the impetus for them came from federal law or their imposition was supported with federal funds. S. 605, 104th Cong., 1st Sess., §§ 203(6), 204(a) (1995) [hereinafter S. 605]. Section 204(b) of the bill apparently precludes suits for statutory compensation against states or state agencies.

choose (short of the sort of direct or gross interference with specifically identified other people or *their* property that makes one a nuisance at common law) takes a clear precedence over the role and responsibility of government, through its law-making authority, to identify and appropriately defend important other interests of individuals and the public. Such private-property absolutism is, however, contrary to historic American constitutional understanding; and without the absolutist premise to support them, "property rights" laws themselves lack any robust public justification. Avoiding grossly unfair distributions of regulatory burdens among our citizens is indeed a highly worthy goal, but "property rights" legislation is not a good way to pursue that goal.

II. FRAMING THE CONSTITUTIONAL CONSIDERATIONS

The leading current proposals in the Senate for statutory compensation for use-restrictions are found in Titles II and V of Senate Bill 605, the proposed Omnibus Property Rights Act of 1995.² Let us look first at Title V. Section 508 would create an entitlement to be paid for diminutions of one third or more in the market value of a parcel of land, or of any "affected portion" of a parcel, as a consequence of use restrictions imposed under either the Endangered Species Act or section 404 (a wetlands provision) of the Federal Water Pollution Control Act,³ unless the Government could establish that the restricted use was already a legally actionable nuisance as "commonly understood" within the applicable state background or common law.⁴ The Title V compensation provision would thus be oddly limited and selective: Its protections would extend only to *landowners*, as distinct from property owners generally,⁵ and indeed the protections would extend only to *certain* landowners—those whose uses are restricted by agency action under the two specifically named federal statutes.

Title II of Senate Bill 605 is much more sweepingly drafted. As does Title V, Title II apparently contains a compensation entitlement for

2. S. 605 was introduced on the floor of the Senate by Majority Leader Bob Dole. See 141 CONG. REC. S4497 (daily ed. Mar. 23, 1995).

3. See S. 605, *supra* note 1, §§ 502(2), 502(6), 508(a). To be precise, the bill speaks of market-value diminutions of 33 per cent or more. *Id.* § 508(a).

4. *Id.* § 204(d).

5. *Id.* § 502(4)(A) (defining a protected "private property owner" as an owner or holder of "property"), and § 502(5) (defining "property" as "(A) land; (B) any interest in land; and (C) the right to use or the right to receive water").

those who sustain reductions of one third or more in the market values of "affected portions" of property resulting from federal-law restrictions of uses not demonstrably common-law nuisances.⁶ By marked contrast with Title V, however, the Title II compensation provision apparently would reach actions pursuant to *any* federal statute (not just two named ones), and apparently would cover *all* property to which the Fifth Amendment might under any circumstances apply.⁷ This means, specifically, not just land and water rights, but fixtures and improvements to land, easements, leases, liens, future interests, rents, contract rights, and, indeed "any interest defined as property under State law; or . . . understood to be property based on custom, usage, common law, or mutually reinforcing understandings sufficiently well-grounded in law to back a claim of interest."⁸ This expression, of course, potentially encompasses sundry interests in all forms of personal property (tangible goods, securities, intellectual property, commercial contract rights, and other intangibles) as well as real property (land and various claims related to land). Senate Bill 605 as currently drafted does not make clear the intended relationship between Titles II and V. For purposes of my testimony, it will be most helpful to treat the compensation provisions in the two Titles—sections 204 and 508 and their respective surrounding definitional materials—as alternative proposals, one grandly sweeping in its coverage and the other narrowly selective.

My topic, as I have said, is how constitutional considerations bear upon appraisals of the merits and demerits of these proposals. Let me make clear at the outset, though, that I do not at any point mean to suggest that there is ground for concern that a court would deny the constitutionality of either compensation provision—Title II's or Title V's—if enacted into law. Measures aimed at equitable provision for those who otherwise would sustain special and unfair burdens as a result of the government's pursuit of its constitutionally granted functions undoubtedly fall within the power expressly granted to Congress by the Necessary and Proper Clause,⁹ as well as within the implied supporting

6. See *id.* §§ 203(7), 204(a)(2)(D). The intended meaning of these provisions is not, however, entirely clear to this reader. See *infra* note 28.

7. See S. 605, *supra* note 1, §§ 203(7), 204(a)(2)(E).

8. *Id.* §§ 203(5)(e)-(f).

9. U.S. CONST. art. I, § 8, cl. 18.

powers confirmed by the Supreme Court in *McCulloch v. Maryland*.¹⁰ Of course, the (substantive) due process and (implied) equal protection requirements of the Fifth Amendment would still apply. Our courts, however, would classify these Titles as economic and social legislation which need only pass a “rational basis” test, or “loose scrutiny,” in order to satisfy these requirements. Although, as we shall see, the highly selective character of Title V’s compensation provision can be strongly criticized as arbitrary, inequitable, and unprincipled, existing precedent strongly indicates that the courts would defer to congressional judgments about how to draw the line between those who will and those who will not receive the benefits of ostensibly remedial legislation.¹¹

In sum, I have no doubt that Senate Bill 605’s compensation provisions would pass constitutional muster in the courts. But if so, one might well ask, what further attention is required from those considering the bill’s merits to constitutional conceptions of property rights and their due protection against infringement? The answer is that the very question of the bill’s merits—the very need to explain what genuine public purpose would be served by transferring funds taxed away from the public at large to certain private owners of property—is closely bound up with the question of how our Constitution has historically been

10. 17 U.S. (4 Wheat.) 316 (1819). If the legislation were to authorize federal compensation suits against states or their agencies, a question of constitutional federalism might arise. See *supra* note 1. Specifically, in order to find sufficient constitutional authorization for such a direct intrusion into state-government affairs, Congress might have to look to section five of the Fourteenth Amendment, which grants it authority to enforce the rights created in section one of the Amendment including, of course, the right not to be deprived by any state of property without due process of law (which the Supreme Court has construed as including the right not to have private property taken by a state for public use without payment of just compensation). Because the drafters of the bill apparently do not intend to create any federal remedy against states or their agencies, I have not here tried to analyze the constitutional-legal issues that might otherwise arise respecting section five of the Fourteenth Amendment, although my discussion below of the *Lucas* case should begin to suggest the potential complexity of these issues.

Section 204(a) of S. 605 does direct against state as well as federal agencies its prohibition of uncompensated, excessive, regulatory diminution of the market values of affected portions of property. Yet section 204(b) apparently (if puzzlingly) precludes a federal cause of action against noncomplying state agencies. Perhaps the intention, which does not seem to be made explicit anywhere in the bill as currently drafted, is that a claim for compensation will lie against the *federal* agencies respectively responsible for administering the federal laws that propel or support the offending state agency actions.

11. See, e.g., *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980) (upholding a statute that “arbitrarily” granted a windfall to current “connected” railroad employees under a “reasonable basis” test).

understood to command *both* a due regard for private property *and* a due regard for representative government's capacity for vigorous pursuit of environmental and other public interests. This point, which is crucial to my testimony, requires some explanation.

Property rights laws are meant to respond to claims of "regulatory taking," that is, claims by owners that legal restrictions on the use of their property are tantamount to takings for public use for which the Fifth Amendment requires a compensation payment. We have to start, then, by asking about the judicial response to such claims. While varying over time in the details, the Supreme Court's response has always been that the Constitution only rarely and exceptionally requires compensation for regulatory use-restrictions, even ones having very substantial effects on market values, as long as the restrictions do not directly impose or conditionally demand any actual entry on private property—any "physical occupation" of it—by the government or the public.¹² Under this time-honored judicial view, imaginable regulatory-taking claims have, for the most part, been legally hopeless. Prospects in some cases might vary somewhat depending on which state or federal lower court you go to, but under the Supreme Court's historic multi-factor balancing test, claims of taking-by-regulation undoubtedly face what lawyers and judges have widely recognized as an uphill fight.

Against such a background, enactment of the compensation provisions of Senate Bill 605 would plainly confer a very nice benefit on whatever segment of property owners would obtain the provisions' protections. (Under Title V this would be a very narrow segment, that is, owners who are burdened by endangered-species and certain wetlands restrictions.) That benefit, of course, would be the prospect of the money the new law would sometimes send to these owners, in circumstances where courts applying the Constitution alone would have allowed them nothing.

The bill, then, is precisely aimed at granting certain property owners anti-regulatory protections in excess of those allowed them by courts applying the Constitution. It aims to accomplish this result by setting a sharp and categorical line of compensability, so that whenever that line is crossed—whenever a use restriction reduces by one third or more the

12. For recent judicial discussions, see *Lucas v. South Carolina Coastal Comm'n*, 112 S. Ct. 2886 (1992) (Scalia, J.); *Yee v. City of Escondido*, 503 U.S. 519 (1992) (O'Connor, J.) (holding that a scheme of rent controls combined with restrictions against eviction of tenants is not a taking). Justice Scalia's *Lucas* opinion is further considered below.

market value of any "portion" of a parcel of property—compensation would be legally due regardless of whether a court in that case would have concluded that the unbolstered Constitution required any compensation at all.¹³

13. According to current judicial doctrine, cases in which the Constitution does not itself call for any compensation payment include many in which regulatory restrictions on uses—uses that very likely do not amount to common-law nuisances—reduce market values of entire landholdings by fractions in excess of one third. See the discussion of the *Lucas* case, *infra* notes 19-25 and accompanying text. Enactment of either Title II or Title V of S. 605 would substantially change this result.

Indeed, if either Title were to be enacted in something similar to its current form, the effect could be extreme. Title V defines protected property as including both "land" and "any interest in land." S. 605, *supra* note 1, § 502(5). Title II contains the most sweeping definition of protected property imaginable, including "inchoate interests," "easements," "security interests," "rents, issues, and profits," "any interest defined as property under State law," and "any interest understood to be property based on custom, usage, common law, or mutually reinforcing understandings sufficiently well-grounded in law to back a claim of interest." *Id.* § 203(5). By making a sufficiently aggressive use of these definitions, any application whatsoever of any sort of land regulation could easily be held compensable, regardless of how marginal its effect on the market value of a landholding taken as a whole, on the theory that it totally devalues a conceptually severed "portion" of property or "interest" in it that common-law usage and lawyers' customary talk identifies as a servitude or negative easement. On conceptual severance, see Margaret J. Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676-78 (1988).

Such an extreme result would run against the grain of the Supreme Court's understanding. See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497-98 (1987) (rejecting claim of total taking of certain identifiable tons of coal, required by anti-subsidence law to be left unmined, because the regulation's proportional effect should be measured against the value of the claimant's entire "mining operation"); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) ("[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety."); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130 (1978) (rejecting claim that prohibition of building in airspace above existing structure totally took the claimant's "air rights," because "[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated").

For the current Supreme Court, the question is still open of how to define "the 'property interest' against which the loss of value is to be measured" in order to determine whether that loss is total. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2894 n.7 (1992) (Scalia, J.). Taken in light of the prior decisions, which Justice Scalia's discussion reviews, the Justice's tentative suggestion there—that "the answer may lie in how the owner's reasonable expectations have been shaped by the State's law of property"—does not portend the simplistic view (which Title II of S. 605 as drafted could be taken to imply) that every regulatory restriction on property use effects a total, hence compensable taking of whatever conceptually severed "portion" or "interest" is affected by the regulation.

To many who take a skeptical view of property rights legislation, it seems that to require in this way the handing over of public funds to private owners whose activities are restricted by otherwise valid laws, *when that is not required by the Constitution's own standard of fairness as judicially ascertained*, is tantamount to giving away public money for no good public reason. The skeptics thus raise the most basic "merits" question one can ask about a piece of legislation: What is the supposed public justification for this conferral of monetary benefits at taxpayer expense on a statutorily defined (under Title V it would be an extremely narrowly and selectively defined) subset of citizens?

To this question, the strongest sort of answer would apparently be the kind that supporters of property rights legislation tend to give. Supporters say this legislative supplementation of judicial efforts to enforce the government's constitutional compensation obligations is required and justified by respect for private property rights, rights which they say courts for some reason—perhaps some institutional or structural reason pertaining more to limits on judicial role and capacity than to true constitutional meaning—have failed to give full protection.¹⁴ Supporters maintain that these judicially under-protected rights are nevertheless legal rights for which the Constitution really does in principle demand absolute protection,¹⁵ and furthermore are moral rights whose absolute protection is demanded by principles at the root of American constitutionalism.

It must be said that this high-principle explanation of the public purpose to be served by the compensation provisions of Senate Bill 605 rings hollow as applied to Title V in its current form. It is hard to see how a law in defense of such exigent moral principles and constitutional rights with respect to private property could possibly confine its protections to that particular subset of landowners who chafe under two selected statutes. This question of selectivity in drafting is one to which I will return later. First, however, I want to consider in a more general way the force of the property rights explanation of the proposed compensation provisions' public purpose: that these provisions serve the

14. See, e.g., 141 CONG. REC. S4497 (daily ed. Mar. 23, 1995) (statement of Sen. Dole). According to Title I of S. 605, the bill's purpose is to "encourage, support, and promote the private ownership of property" and ensure "the constitutional and legal protection" thereof. S. 605, *supra* note 1, § 102.

15. That is, in the form of compensation for every infringement beyond what is already contained in common-law nuisance doctrine.

purpose of aiding the courts in the defense of constitutional and moral rights associated with private property to which our system is historically committed.

This explanation of the bill's public purpose might be a very strong one. It *might* be, but only if its supporting historical premise were as a matter of fact substantially true for the United States. That premise posits an overriding constitutional and moral commitment in this country to a level and sweep of proprietary freedom that decidedly outranks and subordinates the responsibilities of public government. If the premise is incorrect, then it is very hard to discern any persuasive public purpose at all for Senate Bill 605's compensation provisions.¹⁶ The burden of my testimony is that the premise is not, in fact, correct. The correct premise, I suggest, is the one faithfully reflected by the Supreme Court's sustained refusal over the decades to open wide the gates to regulatory taking claims. This consistent stance has not been a result of some quirky judicial inability to go ahead and defend private property to the hilt as the American social contract requires. To the contrary, it has been the entirely appropriate result of the Court's accurate perception that the American social contract—what Justice Scalia has called “the historical compact recorded in the Takings Clause that has become part of our constitutional culture”¹⁷—decidedly does not require such a to-the-hilt

16. It may be that an anticipated, perhaps a desired, practical consequence of enactment of these provisions would be sharply reduced regulatory activity under certain federal statutes. But if such an expected deregulatory consequence is the true aim of S. 605's compensation provisions, then direct repeal or amendment of the regulatory laws in question is obviously the more straightforward, responsible, and accountable way to pursue that aim.

Some may argue that requiring agencies to cover the private costs of their regulatory actions out of their appropriations will be conducive to agencies making economically rational regulatory choices. That argument, however, is very frail. In general, it overlooks the problem of inefficiencies of private overinvestment in uses destined for regulatory restriction. See, e.g., Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986). Even disregarding that objection, the argument in this context is especially ill-considered. Senate Bill 605's most directly predictable effect on budget-conscious agencies must be to bias their selection of cases for regulatory enforcement against those in which enforcement might make a one-third-or-more difference in the market value of some “portion” of a private property holding. But there is no *a priori* reason to believe that these cases will tend to be ones where enforcement would produce relatively low (or negative) surpluses of total (public-plus-private) benefit over total (public-plus-private) costs. The opposite seems just as likely to be true. It follows that S. 605's predictable effect on the economic rationality of agency enforcement choices can be no better than random.

17. *Lucas*, 112 S. Ct. at 2990.

insulation of private property from public concerns, but rather requires a much more sensitive mediation between two fundamental constitutional principles: respect for private property, and respect for representative government's responsibility to discern and secure important interests of the commonwealth or of the public considered as a whole.

III. THE CONSTITUTIONAL ANALYSIS: "REGULATORY TAKING" IN FULL CONSTITUTIONAL CONTEXT

That some disproportionately severe and unforeseeable regulatory restrictions on property use would excite concerns about rights to compensation is entirely understandable and appropriate. As a starting point for analysis, however, we should note that treating use restrictions as compensable takings was no part of what the Framers of the Fifth Amendment had in mind. As Justice Scalia has written, "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all."¹⁸ Nor does a literal reading of the clause—"nor shall private property be taken for public use without just compensation"—provide much support for the idea of taking-by-regulation, given that it is obviously *something* of a stretch to say that the government "takes" your land "for public use" when what the government precisely does is forbid you certain uses of land (as opposed to granting itself or anyone else any use of it) to which you continue to hold an exclusive private title.

None of this means that taking-by-regulation is an insupportable constitutional notion. It only means that the main basis for any such notion is neither the literal meaning of the words of the clause nor the Framers' original understanding. Rather, in entertaining the idea of a taking-by-regulation, we are allowing broader moral and purposive considerations to enter into our determinations of the Constitution's legal meaning. A "regulatory taking" claim is, after all, a claim that a certain governmentally imposed restriction on the use of property *ought*, in all constitutional *reason*, to trigger a governmental duty to compensate.

The Supreme Court has not been closed to such claims, but it has found American constitutional reason to be sufficiently complex to preclude anything even approaching blanket acceptance of them. The best short way to convey this judicial understanding is to recall some crucial passages from Justice Scalia's opinion for the Court in the 1992

18. *Id.* at 2900 n.15.

case of *Lucas v. South Carolina Coastal Council*.¹⁹ Briefly, the background is this: As noted above, under the Court's pre-*Lucas* multi-factor balancing test,²⁰ regulatory-taking claimants could only hope to succeed in a few, rare instances. The *Lucas* decision somewhat strengthens the prospects of some future claimants by modifying the previous test in one particular: It adds a categorical presumptive rule requiring compensation in those cases, which Justice Scalia took pains to point out would be "relatively rare," in which a use-restriction denies *all* economically beneficial or productive use of a parcel of land and the restricted use is not already a nuisance under preexisting state law.²¹

An obvious question is: Why should the Court have thus drawn the line of presumptive compensability at the seemingly arbitrary point of *total* extinguishment of beneficial use of a landholding? Justice Scalia's explanation of the Court's reasoning for doing so is important for our purposes, because it is quite at odds with the underlying premise of the proposed property rights legislation.

The Court's task in this context, Justice Scalia explained, is to keep constitutional law in tune with the American public's deeply shared sense of the basic proprieties of constitutional government in its dealings with private property. Here are Justice Scalia's words explaining both the judicial task and the relevant, entrenched American constitutional understanding:

[O]ur "takings" jurisprudence . . . has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State

19. 112 S. Ct. 2886 (1992).

20. The test takes into account the extent of the regulatory devaluation of the entire property-holding in question, whether that devaluation destroys a distinct and justified investment-backed expectation, and "the character of the government action"—whether it involves an actual physical encroachment on the affected property and whether it demands the claimant donate his property to production of a new public benefit, as opposed to avoiding uses of the property that infringe harmfully on established public interests. See, e.g., *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470 (1987). As the Court has repeatedly recognized, none of these factors is susceptible of precise definition or mechanical application; all are somewhat roughly intuitive considerations whose exact force is hard to specify outside the context of particular claims of regulatory unfairness.

21. See *Lucas*, 112 S. Ct. at 2894, 2900.

in legitimate exercise of its police powers; “[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power.”²²

Justice Scalia’s meaning is unmistakable: Thoughts of compensation are, by the prevalent understanding of Americans, simply out of place in most instances of regulatory restrictions on property use. The American way has been to treat the bulk of these events as belonging to the normal give-and-take of a progressive, dynamic, democratic society, an ordinary part of the background of risk and opportunity against which we all take our chances in our roles as investors in property, and from which we all as actual or potential property investors also reciprocally benefit.²³ Now Justice Scalia did, of course, have a bit more to say:

In the case of land, however, we think the notion . . . that title is somehow held subject to the “implied limitation” that the State may subsequently eliminate *all* economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.²⁴

In other words, the Court accepts a responsibility to deal with taking-of-property claims in a way that is consonant with, and so will help sustain public confidence in, what the opinion calls “the historical compact,” meaning historic American commitments to respect for basic principles of constitutional government, including, yet not limited to, the institution of private property. From its observation and knowledge of the country’s actual constitutional culture, the Court draws the conclusion that there are some regulatory takings claims—those that involve *total* extinguishment

22. *Id.* at 2899 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (Holmes, J.)).

23. At this point in American history, it is obvious that the market value of any property holding is what it is because of prior and current governmental actions that could not have occurred without this country’s long-standing endorsement of the government’s ability to regulate property, beyond the common law of nuisance and without having to pay for the privilege, except in rare and exceptional cases. It would thus be very arbitrary, a step away from distributive fairness and not toward it, to entitle some members of the current generation of property owners to compensation based on comparisons of their holdings’ respective market values before and after application of a *particular* regulatory restriction to them. That approach disregards the market-value benefits accruing to every current owner from the *entire* past and present *system* of government action. It exempts the owners it benefits from compliance with the constitutional compact on which *all* property market values depends.

24. *Lucas*, 112 S. Ct. at 2900 (emphasis added).

of a land parcel's economic value—that cannot be rejected without contradicting the country's commitment to private property.

Thus the *Lucas* Court was moved by its knowledge that the constitutional compact includes, as one of its terms, a commitment to respect the institution of private property. The Court, however, was equally moved by its knowledge that the compact also includes principles and commitments that must limit and qualify private property in ways that make the bulk of regulatory-takings claims unfit for resolution by any kind of flat and sweeping categorical rule. Specifically—and here I elaborate on what is plainly conveyed by Justice Scalia's circumspect treatment of the regulatory-takings question—our constitutional culture and compact include a deep and ancient tradition of expected regard for other people's and the public's interest and concerns when you make use of your property.²⁵ It includes a deep and ancient strain that says this expectation of regard for public interest and concerns is subject, when the occasion requires, to legislative definition and regulatory enforcement.²⁶ The tradition, in sum, is one of a law of property that is oriented *both* to fair protection of private advantage *and* to due regard for contemporary community goals, relying, in part, on the police powers of legislatures, alongside common law adjudication by courts, to negotiate and mediate between the two.

There are signs that the drafters of Title V have themselves sensed the strength of the expectation of governance built into the historic American understanding of rights of property. I have in mind the ambivalence we have already noticed in Senate Bill 605, as introduced, between an arbitrarily narrow and a sweepingly broad scope for the proposed statutory guarantee of compensation for use restrictions. The drafters confined Title V's coverage to two selected laws, but on what principled basis did they do so? It is possible, of course, that this selectivity just reflects particular anti-regulatory sentiments that have little to do with any broad principle of protection for private property rights as such.²⁷ But the drafters could have had a different reason for

25. See, e.g., FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 9-36 (1985) (discussing colonial American conceptions of liberty and property).

26. See, e.g., John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1 (1993) (discussing the *Lucas* case in the context of historical Supreme Court jurisprudence).

27. To repeat: I am not here suggesting for a moment that a court ought to hold the bill unconstitutional on this ground. I am suggesting that the specifically benefitted

shrinking back from making Title V cover all property as affected by all regulatory laws—that such a broadly drafted bill would run so hard against the prevalent American understanding of the full constitutional compact as to be politically unacceptable.

This takes us back to Title II of Senate Bill 605, as introduced. Although the matter is not free from doubt, Title II can be read as calling for compensation for market-value reductions of one third or more that are attributable to any federal regulatory laws as applied to property holdings of any kind.²⁸ Let us suppose this is the correct reading. What would be the real-world consequences? In palpable jeopardy, it seems, would be not just two laws of uncertain popularity to which there is strongly organized political opposition, but also the labor and workplace laws, the anti-discrimination laws, the anti-trust and regulated-industry laws, the banking and securities and trade-regulation laws, the food and drug and labeling laws, and the air-pollution laws. All of these laws have important applications to property uses that are not legal nuisances under state common law, in ways that it would seem can often have a substantial effect on the market values of property holdings.

constituencies here, owners of land burdened by the two regulatory programs picked out by Title V of S. 605, compose an arbitrarily small subset of American property owners whose holdings would be worth substantially more on the market if granted special relief from federal regulatory restrictions of non-nuisance uses—so arbitrarily small as to shed doubt on the idea that Title V is aimed at vindicating a broad, general, and exigent constitutional and moral principle of private-property protection. This highly select group of beneficiaries of public leniency—some of them, I am sure, exceptionally deserving of the public's consideration, but not nearly all of them and surely not, as a group, any more so than many who have been left out—seem something like the gerrymandered subset of railroad retirees who were grandfathered into “dual benefits” by the legislation upheld against constitutional objection in *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980).

28. See *supra* notes 6-8. Section 204(a)(2)(D) entitles an owner to compensation whenever, “as a consequence of an action of any agency,” private property is taken for public use and, in addition, the action diminishes the fair market value of any portion of property by one third or more. Section 203(2) defines “agency action” to include any action by an agency that “adversely affects private property rights.” Section 203(7) defines “taking of private property” to include “any action whereby private property . . . is taken so as to require compensation under . . . this Act, including by . . . regulation.” There is some undeniable circularity in this combination of provisions as they stand. Nevertheless, a court could very well decide that their intent when taken all together is to provide that an enforced regulatory restriction of property use is a statutorily compensable event when it causes a diminution of one third or more in the market value of any portion of any property.

Take, for example, a case of property in the form of a manufacturing plant and an owner who makes a credible case that the market value of the property holding at this location would be enhanced by, say, forty percent if all his activities at the site were relieved of either wage-and-hour, workplace-safety, or collective-bargaining regulation.²⁹ The activities restricted by these classes of regulation do not resemble common-law nuisances. Does our owner, then, collect compensation for having to pay the minimum wage, or for having to introduce safety routines or devices, or for having to bargain in good faith with a labor-board certified union?

Would this conclusion be erroneous because these laws do not have the effect of *restricting the use*, and thereby diminishing the market value, of any discrete parcel of *property*—which is the obviously intended concern of Title II? It does not seem so, because our owner can always say: “Look, here is a particular right or interest in property I used to have: piece-work shop, at a monthly labor cost of \$X (here are my books for the past year to prove it), as long as I could find folks willing to work for that amount (which the evidence will show I still can). May it please the court, my former right and property interest to that effect no longer exists, now that the agency has cited me for violating the wage law (or the safety law or the bargaining law).”³⁰

Would the American public endorse, as consonant with their constitutional compact, a law having such consequences as these? If you carefully told the people that a bill carried implications as sweeping as what I have just described, all the while assuring them that the bill did

29. Of course, it would take some serious economic analysis to show this. You would have to know and show a lot about the competitive structure of the market in which the manufacturer was selling. But, suppose he has unorganized competition, or competition from abroad, so that being subjected to collective-bargaining or wage-and-hour or safety regulation does, in fact, seriously reduce the net revenue stream he could otherwise expect from his factory. The assumption is that he cannot raise prices to cover additional labor costs without an unacceptable loss of market share, but also that his reduced net revenues still remain his most economically favorable use for the property with its standing factory.

30. The example is easily extendible to the other classes of federal regulation I mentioned above: anti-discrimination, antitrust and regulated industries, banking and securities and trade regulation, food and drug and labeling, and air pollution. A moderately able judge would have little trouble reaching and defending a conclusion (for example) that a divestiture order in a monopolization case, or an order to cease and desist from discriminatory pricing, or insufficient labeling of a product manufactured at or sold from a particular location destroyed a previously existent right or interest in using certain property in a certain way.

so in the name of a higher-law mandate to respect property rights, would the people understand? Agree? Approve? Or none of the above? Would such a sweepingly drafted property-rights bill command the requisite congressional majorities? Perhaps these questions answer themselves. I believe they show what is deeply wrong with the central premise—the absolutistic property-rights premise—underlying the proposed legislation.

Drafters of property rights legislation confront a serious dilemma. Earlier I suggested that confining the coverage of a property rights law to use restrictions imposed under a few selected statutes shows that the law is not really about property-rights protection at all, but rather is about specific anti-regulation objectives. Just now, I have been trying to suggest that the alternative—a broad-coverage bill that would display the courage of its property-right convictions—carries diminutive implications about the powers and responsibilities of government in our system that Americans would not recognize as consonant with their full constitutional compact. The ultimate lesson, I believe, is that the regulatory takings issue cannot be responsibly handled at wholesale, with a simple statutory formula. The problem is obstreperously, recalcitrantly multi-factorial and contextual. It can only be handled at a more retail level, as courts have done with the balancing test. The *Lucas* decision requires nothing different except in the “relatively rare” case of a total extinguishment of the economic value of a landholding.

I do not mean that only judicial case-by-case balancing will serve, or that there is no room here for entirely appropriate congressional action aimed at improving the fairness of the distribution of regulatory burdens. I believe it would make a great deal of sense for Congress to take up regulatory programs one by one, to try to find fair formulas for compensability that are tailored to the various programs. But the case of an owner of a family-sized building lot who unexpectedly discovers it to be the last remaining habitat for an animal species is not the same, morally or (broadly speaking) constitutionally, as the case of an investor in thousands of forest acres who discovers some portion of the acreage to be such a habitat, or the case of an investor (in our times) in thousands of acres of river valley who “unexpectedly” discovers that some of the land is a swamp, as defined by law (even a newly enacted law). Congress ought not to pretend otherwise. Improved responsiveness to property rights will have to be responsive to such differences, too, if it means to claim real resonance with the American historical compact.

